Supreme Court, U.S.
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No. 98-1219

In The

Supreme Court of the United States

October Term, 1998

MARLENA RUSSELL,

Petitioner,

v.

CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF INTERESTED PARTIES

The Petitioner is Marlena N. Russell.

The Respondent is the Chattanooga-Hamilton County Hospital Authority, a governmental entity created by a Private Act of the Tennessee legislature. 1976 Tenn. Priv. Acts Chpt. 297. There are no parent companies or non-wholly owned subsidiaries of the Respondent.

TABLE OF CONTENTS

Page

LIST OF INTERESTED PARTIES i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

PRIOR COURT OPINIONS 1

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

A. Course of Proceedings and Disposition of the Case Below 2

B. Statement of Facts 3

C. Correction of Misstatements of Facts and Law in the Petition 3

REASONS FOR DENYING THE WRIT 13

I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPROPRIATE STANDARD OF REVIEW UNDER RULE 52(a) AND SUCH CONFLICT, EVEN IF ASSUMED TO EXIST, WOULD NOT BE AT ISSUE IN THIS CASE 13

II. THE PETITIONER SEEKS REVIEW OF ALLEGED ERRORS CONCERNING CLAIMS THAT WERE NEVER ASSERTED 14

III. THE ELEMENTS OF A PRIMA FACIE CASE IS NOT AT ISSUE BECAUSE THE TRIAL COURT ASSUMED THAT A PRIMA FACIE CASE WAS ESTABLISHED AND THEN EVALUATED WHETHER THE PLAINTIFF HAD PROVEN THE ULTIMATE QUESTION OF DISCRIMINATION 17

TABLE OF CONTENTS – Continued

Page

IV. THE COURT DID NOT ERR BY DENYING MS. RUSSELL'S EQUAL PAY ACT CLAIM BECAUSE SHE PROVIDED NO EVIDENCE TO SUPPORT IT 20

V. THE PETITION PRIMARILY SEEKS TO HAVE THIS COURT SETTLE FACTUAL DISPUTES, AND NOT ISSUES OF LAW 22

CONCLUSION 23

APPENDIX

Opinion of the United States Court of Appeals for the Sixth Circuit (filed September 8, 1998) ...App. 1

Memorandum Opinion and Judgment of the United States District Court for the Eastern District of Tennessee at Chattanooga (filed May 14, 1997) .....App. 3

Rule 52(a) of the Federal Rules of Civil Procedure and Advisory Committee Notes to the 1985 Amendment .....App. 15

Statement of Issues on Appeal to the Sixth Circuit Court of Appeals .....App. 19

Respondent's Statement of Facts submitted to the Sixth Circuit Court of Appeals .....App. 21

TABLE OF AUTHORITIES

Page

CASES CITED

Betkerur v. Aultman Hosp. Ass'n, 78 F.3d 1079 (6th Cir. 1996) 19

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) ..22, 23

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 22

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 18, 19

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)..... 19

Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987) 21

Runyon v. McCrary, 427 U.S. 160 (1976)..... 6

St. Mary's Honors Center v. Hicks, 509 U.S. 502 (1993) 18

Stancil v. Claytor, 30 F.E.P. (BNA) 730 (D.D.C. 1978) 19

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 18

Youakim v. Miller, 425 U.S. 231 (1976) 17

STATUTES CITED

29 U.S.C. § 206.....2, 15

42 U.S.C. § 1981.....6, 16

42 U.S.C. § 2000e.....2, 14

TABLE OF AUTHORITIES – Continued

Page

RULES CITED

Rule 15.2, Rules of the United States Supreme Court 3

Rule 16(e), Federal Rules of Civil Procedure 15

Rule 52(a), Federal Rules of Civil Procedure.... 12, 13, 14

RESPONDENT'S BRIEF IN OPPOSITION

PRIOR COURT OPINIONS

The Respondent requests that the Court deny this Petition for Writ of Certiorari seeking review of a per curiam decision of the United States Court of Appeals for the Sixth Circuit (hereinafter "Sixth Circuit") issued on September 8, 1998. The opinion of the Sixth Circuit has not been reported and is not recommended for full text publication pursuant to the rules of that Court. The unpublished memorandum of the Sixth Circuit is reproduced at Respondent's Appendix pages 1-2. The decision of the United States District Court for the Eastern District of Tennessee (hereinafter "District Court") issued on May 14, 1997 also has not been published. The unpublished memorandum of the District Court is reproduced at Respondent's Appendix pages 3-14.

STATEMENT OF JURISDICTION

The jurisdiction of the Supreme Court to hear this petition is not contested.

STATEMENT OF THE CASE

The Respondent respectfully opposes the Petition for Writ of Certiorari (hereinafter "the Petition") which is based upon numerous misstatements of the facts and the law in this case.

A. Course of Proceedings and Disposition of the Case Below.

The Petitioner, Marlena N. Russell (hereinafter "Ms. Russell," "Plaintiff," or "Petitioner") filed her complaint against her former employer, the Chattanooga-Hamilton County Hospital Authority (hereinafter "Hospital Authority") following Ms. Russell's dismissal from employment with the Hospital Authority. Ms. Russell contended at trial that she was discriminated against because of her gender by her employer in violation of 42 U.S.C. § 2000e, that she was retaliated against by her employer for asserting rights under 42 U.S.C. § 2000e, and that she was discriminated against in her wages because of her gender in violation of 29 U.S.C. § 206.

A non-jury trial was held on May 1, 2 and 5, 1997, in the United States District Court for the Eastern District of Tennessee at Chattanooga. On May 14, 1997, the District Court issued its ruling dismissing all claims against the Hospital Authority. The District Court, first noting that Ms. Russell failed to establish a prima facie case of discrimination or retaliation, then assumed that a prima facie case had been established and evaluated the evidence to determine whether Ms. Russell had proven the ultimate question of discrimination or retaliation by a preponderance of the evidence. The court found that she had not. With respect to Ms. Russell's Equal Pay Act claim, the District Court ruled that Ms. Russell could not establish a claim by comparing the Finance Director position with the Site Administrator position because Ms. Russell never held either job. The court further found that Ms. Russell presented no evidence concerning the skill,

effort, or responsibility that is required for those jobs. The Plaintiff failed to present any evidence that she received less pay than any employee who was performing a job that required substantially equal skill, effort and responsibility as compared to any job that the Plaintiff held. (Respondent's App. pp. 3-14)

The Petitioner appealed this decision to the Sixth Circuit. The Sixth Circuit subsequently affirmed in a per curiam opinion the decision rendered by the District Court. The appellate court specifically found that Ms. Russell had not demonstrated clear error by the District Court in its findings of facts, or any commission of an error of law that would warrant reversal. (Respondent's App. pp. 1-2)

B. Statement of Facts

The memorandum opinion of the District Court correctly sets forth the facts of this case and the Respondent respectfully directs this Court's attention to that opinion. Additionally, the Respondent's Statement of Facts submitted in its appellate brief to the Sixth Circuit includes citations to the record and is reproduced at Respondent's Appendix pages 21-32.

C. Correction of Misstatements of Facts and Law in the Petition.

Pursuant to Rule 15.2, Rules of the United States Supreme Court, the Respondent brings to the Court's attention the following misstatement of facts and law contained in the Petition.

In Section I of the Petition, page 3, (and Section IV, page 7), the Petitioner's statements that separate Site Administrators were required for the two separate sites of the health centers, and that the proposed Site Administrator position required previous management experience and a Master's Degree, are incorrect. In 1992, a representative from the Department of Health and Human Services recommended that a separate Site Administrator be appointed for the Dodson Avenue Community Health Center. (Albert Head, TR 277).[1] Mr. Head initially agreed with this recommendation, but then decided that he needed Ms. Russell to remain in her position as Patient Financial Services Manager rather than reassigning her to the Site Administrator's position. (Albert Head, TR 278, 281, 284). At no time, however, was it required that a Site Administrator be named and no one was ever appointed to this position. (Albert Head, TR 294). Furthermore, there was never a job description prepared for the Site Administrator position (other than one prepared by Ms. Russell herself on her own initiative) and no job requirements for this position were ever set. (Marlena Russell, TR 113; Albert Head, TR 292).

In Section II of the Petition, page 4, the Petitioner claims that the grant application required Ms. Russell to move to the Dodson Avenue Center site before December 1, 1992. Again, this statement misrepresents the evidence in this case. Mr. Head told Ms. Russell in November, 1992, that he needed her to remain in the position of

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[1] The trial transcript is designated "TR," and is preceded by the name of the witness testifying and followed by the specific page number in the transcript at which the reference occurs.

Patient Financial Services Manager because of changes in the information management systems within her department and that he would review the decision to place her in the Site Administrator position by March 1. (Albert Head, TR 285-86, 323). Ms. Russell asked Mr. Head if she could move her office to the Dodson Avenue site and he allowed her to do so, but Mr. Head did not tell her, nor did he intend, that the change of offices would mean her taking the position of Site Administrator. (Albert Head, TR 286). Ms. Russell was never required, nor even requested, to move her office to the Dodson Avenue site. She was allowed to do so at her own suggestion.

Ms. Russell further asserts in Section II, page 4, that Mr. Head did not intend at any time to place her in the position of Site Administrator. Again, this is not correct. In the summer of 1992, Mr. Head expressed to Ms. Russell his intentions to name her to the new Site Administrator position, effective December 1, 1992. (Albert Head, TR 278, 281). In October, 1992, Mr. Head was informed by the Chief Executive Officer of Erlanger Medical Center that the health centers were to adopt the Erlanger Medical Center computerized information management system, known as the BHIS system. (Albert Head, TR 284). The BHIS conversion, scheduled to be completed by December 1, 1992, impacted the operations and functioning of the patient accounts and medical records areas of the health center managed by Ms. Russell. (Albert Head, TR 284-85; Marlena Russell, TR 110). Mr. Head determined that he needed Ms. Russell to remain in her present position as Patient Financial Services Manager to oversee the implementation of the BHIS system, and that he would review the decision to place her in the Site

Administrator position by March 1. (Albert Head, TR 284-86, 323).

In January, February and March, 1993, Mr. Head began receiving complaints concerning Ms. Russell. These complaints included concerns expressed by other senior management personnel at the health centers that Ms. Russell had improperly conveyed sensitive and confidential information (Albert Head, TR 286-87; Marlena Russell, TR, 114-15); a report by the Erlanger Accounting Department severely criticizing the management of Ms. Russell (Albert Head, TR 285-90, Lois Uren, TR 421-27); and a complaint from a disabled employee concerning improper treatment by Ms. Russell. (Albert Head, TR 281-84; Charlesetta Woodard-Thompson, TR 450-53). In February or March, 1993, Mr. Head determined that Ms. Russell should remain in the Patient Financial Services Manager position rather than being transferred to the Dodson Avenue Site Administrator position. (Albert Head, TR 291). Mr. Head informed Ms. Russell of this decision on March 4, 1993, and told her that she would be supervised directly by the Director of Finance, Derrek Jones. (Albert Head, TR 291).

The Petition, at page 4, also asserts that 42 U.S.C. § 1981 provides a remedy for sexual discrimination or harassment. (Petition pp. 4-5). Clearly, this statement of law is incorrect. Section 1981 prohibits racial discrimination in the formation and enforcement of contracts and does not address sexual discrimination. *Runyon v. McCrary*, 427 U.S. 160, 167 (1976).

In Section III of the Petition, page 6, Ms. Russell claims that she was demoted from the position of Site

Administrator in retaliation for filing a grievance on March 22, 1993 through the Hospital Authority's internal grievance procedure for alleged sex discrimination and harassment. This claim is not supported by the evidence and is a logical impossibility. The subject of which Ms. Russell grieved on March 22, was that she had never received the anticipated promotion to the Site Administrator's position. (TR, Plaintiff's Exhibit 19).[2] Therefore, it is not possible that she was demoted from the Site Administrator position in response to the filing of the grievance, when the failure to promote her to the position was the subject of her original grievance. Furthermore, her assertion that she was placed in the Site Administrator position is contrary to the evidence. There was never a job description formalized for this position, there were never any personnel documents prepared reflecting that Ms. Russell would be or had been transferred to the

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[2] Ms. Russell's Statement of Condition Leading to Grievance as submitted by her on the March 22 grievance is as follows: "Albert Head is consistently guilty of causing grievances because of making incorrect decisions and sufficient lack of competence. In the grievance which I have filed, Albert Head is guilty of misleading The Alton Park Board of Directors, Mr. Wayne Cutchins of The Office of Grants Management and Marlena Russell by deliberately signing an Institutional File and Programmatic Assurance. In signing this document Albert Head committed not only to promoting Marlena Russell to the position of Administrator, but, assured that documentation (such as job description) exist on-site and comply with sections 329/330 Program expectations. Albert Head admitted in a meeting on March 17, 1993 with Sheryl Gould, Charlesetta Woodard-Thompson that he had never prepared a job description for the Administrators' position, and he had no intention of filling that position." (TR, Plaintiff's Exhibit 19).

position of Site Administrator, there were never any wage or benefit documents prepared reflecting such a change, and there was never any change in the wages paid to Ms. Russell. (Marlena Russell, TR 113). Ms. Russell was never placed in this position. (Albert Head, TR 292; Albert Barnett, TR 439, 444).

Ms. Russell's reliance on the statement by Ms. Woodard-Thompson also is misplaced. Ms. Woodard-Thompson's testimony at trial was that she was acting as a mediator in an effort to resolve the dispute between Ms. Russell and Mr. Head. Ms. Woodard-Thompson's statement cited by Ms. Russell was made after the mediation effort had failed and Ms. Woodard-Thompson was attempting to clarify the job responsibilities of Ms. Russell. Ms. Woodard-Thompson was not attempting to state in her letter that Ms. Russell was or was not in the Site Administrator position. (Charlesetta Woodard-Thompson, TR 457-58).

In Section IV of the Petition, page 7, Ms. Russell claims that the Respondent produced no evidence that disputed the change in Ms. Russell's salary or job title. The Petition's version of this highly-contested issue is simply wrong. Ms. Russell testified herself that there was never a job description formalized for this position, there was never any personnel documents prepared reflecting that Ms. Russell would be or had been transferred to the Site Administrator position, and there was never any change in the wages paid to Ms. Russell. (Marlena Russell, TR 113). Albert Head and Albert Barnett also testified that Ms. Russell was never placed in the Site Administrator position. (Albert Head, TR 292; Albert Barnett, TR 439, 444).

In Section V of the Petition, pages 9-10, Ms. Russell attributes several comments to Mr. Head. At trial, Mr. Head denied making these comments or placed the comments in the context in which they were made. (Albert Head, TR 298-99, 311-15). None of these comments, even if accepted as true, relate to Mr. Head's decision not to place Ms. Russell in the Site Administrator's position.

In Section VII, pages 13-14, the Petition claims that Mr. Head conspired with Ms. Uren and Ms. Johnson concerning the criticism of Ms. Russell. This allegation is contrary to all evidence in the case. Mr. Head and Ms. Uren both testified that Mr. Head did not discuss or attempt to influence the contents of the report. (Albert Head, TR 290; Lois Uren, TR 426-27). There is no evidence supporting this allegation.

In Section VIII of the Petition, pages 16-17, Ms. Russell claims that she was unable to pick up the bank bags for the daily deposit of funds from the Dodson Avenue Health Center because she was dealing with the hysterical daughter of a heart patient and was unable to leave the site. Ms. Russell's formulation of events is incorrect. Ms. Russell's job responsibilities as Patient Financial Services Manager required her to ensure that bank bags were collected from the bank each day so that daily deposits of cash receipts at the Dodson Avenue Community Health Center could be made. (Derrek Jones, TR 360-61; Marlena Russell, TR 128). This daily deposit of cash and receipts was important, so that cash would not have to be held by the health center overnight, and to maintain a sufficient cash flow in the administration of the health center. (Derrek Jones, TR 360-61, 384). Ms. Russell's claim that the bank deposit could not be made

even if the bag had been picked up is incorrect, since another guard could have dropped the bags off in the night deposit drop box. (Derrek Jones, TR 384).

Ms. Russell knew that it was her responsibility to see that the bank bags were picked up. (Marlena Russell, TR 128; Defendant's Exhibit 28). Ms. Russell knew that she was the only individual present at the Dodson Avenue Community Health Center on May 25, 1993, who was authorized to pick up the bank bags. (Marlena Russell, TR 123). Ms. Russell made a conscious decision at that time, however, that she would not do so. (Marlena Russell, TR 87, 123, 132, 134). At 12:00 noon, Ms. Russell wrote a memorandum to her supervisor, Derrek Jones, stating that the health center would have to retain cash on site that night because Mr. Jones had failed to add another employee's name to the bank's list of employees authorized to collect the bank bags. (Marlena Russell, TR 125-26; Defendant's Exhibit 28). At approximately 3:30 p.m., Mr. Jones telephoned Ms. Russell and instructed her on three separate times to collect the bags. (Derrek Jones, TR 363-65). Ms. Russell first argued incorrectly that she was not authorized to pick up the bank bags, then she stated that she had too much paperwork to do, and then she flatly refused to pick up the bags, stating to Mr. Jones, her direct supervisor, "I'm not going to argue with you, I'll pick them up tomorrow." (Derrek Jones, TR 362-65). At no time did Ms. Russell state that she was assisting with the hysterical daughter of a patient. Ms. Russell testified that even though she considered this heart patient to be an emergency and a matter of life or death, she admits that she never checked to see if the patient was on the health center premises or what her condition

might be, never checked to see that the heart patient was examined by a doctor, and never checked to ensure that the daughter got the medication allegedly needed by her mother. (Marlena Russell, TR 136-40).

Ms. Russell also claims that her discharge was the result of a conspiracy and was ordered by Mr. Head. (Petition, p. 18). Again, this is a misstatement of the facts. Mr. Jones made the decision that Ms. Russell should be dismissed from her employment after he received the memo from Ms. Russell attempting to place the blame on him for her refusal to pick up the bank bags. (Derrek Jones, TR 368). Mr. Head did not advise Mr. Jones concerning any action that should or should not be taken, but instead referred Mr. Jones to the Human Resources Department at Erlanger Medical Center. (Derrek Jones, TR 366-67; Albert Head, TR 293-94). Mr. Jones then prepared the personnel record notation dismissing Ms. Russell, and presented it to Ms. Russell on May 26, 1993 for her review and comments. (Derrek Jones, TR 370-71). The dismissal notice was then given to Mr. Head for his signature following Ms. Russell's opportunity to make any comments on the discharge notice. (Albert Head, TR 294). Ms. Russell's characterization of Mr. Head's signature as ordering the discharge completely misrepresents the evidence presented at trial, and even contradicts Ms. Russell's own contention at trial that her dismissal was improper because the dismissal notice that she was presented at the time of her discharge did not have Mr. Head's signature. (Marlena Russell, TR 99-101, 146-47).

The Respondent also objects to the documents attached in the Petition's Appendix on the grounds that such documents are inaccurate and do not reflect the

documents which they allege to represent, or are documents that were never admitted into evidence at trial. Specifically, the Petition represents Appendix D as being Rule 52(a) of the Federal Rules of Civil Procedure, although significant portions of Rule 52(a) are omitted. Critically, Appendix D omits the following sentence: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." This sentence, added in the 1985 amendments to the Rule 52(a), specifically addresses and resolves the issue raised by the Petition concerning the standard of review by an appellate court.

Additionally, Appendix D inaccurately reproduces the Advisory Committee notes for the 1985 Amendments to Rule 52(a). Again, concerning the specific issue of appellate review raised in the Petition, the Appendix omits the pertinent portion of the Advisory Committee notes stating, "Rule 52(a) has been amended (1) to avoid continued confusion and conflict among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity." Rule 52(a) and the Advisory Committee notes for the 1985 Amendments are reproduced in the Respondent's Appendix, pages 15-18.

The Respondent further objects to those documents found at Appendix E and Appendix H (and quoted at length at pages 20-21) in the Petition. These documents

were never admitted into evidence at trial and are not part of the record.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE APPROPRIATE STANDARD OF REVIEW UNDER RULE 52(a) AND SUCH CONFLICT, EVEN IF ASSUMED TO EXIST, WOULD NOT BE AT ISSUE IN THIS CASE.

The Petition asserts that there exists a conflict among the Circuit Courts of Appeal regarding the appropriate standard of review under Rule 52(a) when court findings are based solely on documentary evidence.

First, it should be noted that even if one were to assume that such a conflict did exist, the conflict would not be at issue in this case because the District Court's findings followed and were based upon three days of live testimony by witnesses. The trial judge saw and heard the witnesses and was able to observe the witnesses' demeanors, and did not base his findings entirely on documentary evidence.

Moreover, any historical conflict that may have existed concerning the deference given to factual findings by the trial court based entirely on documentary evidence was resolved by the amendment to Rule 52(a) in 1985, which clearly states, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52(a), Fed. R. Civ. P. The

detailed history of this issue concerning the appropriate deference to be given to trial court findings based entirely upon documentary evidence and the issue's resolution are provided in 9A Wright & Miller, *Federal Practice and Procedure*: § 2587 (1995). Indeed, while the Petitioner does cite several cases in support of her position, she fails to offer any case law following the 1985 Amendments. There is no legal support for the Petition's claim that there exists a continuing conflict among the Circuits.

Furthermore, it is not clear whether the Petitioner is claiming that the Sixth Circuit erred by applying, or by failing to apply, the clearly erroneous standard to the factual findings of the trial court. (*See* Petition, pages 1, 7 and 26). Nevertheless, the Sixth Circuit decision expressly states that it applied the clearly erroneous standard to the District Court's findings of facts, as was appropriate and correct under Rule 52(a). (Respondent's App. p. 1).

II. THE PETITIONER SEEKS REVIEW OF ALLEGED ERRORS CONCERNING CLAIMS THAT WERE NEVER ASSERTED.

The Petitioner asks this Court to review alleged errors concerning legal claims that were not even asserted by her at the trial court or on appellate review. There being no such legal claims made, there can be no legal errors for this Court to review. In the final pretrial order, Ms. Russell listed her claims as follows: "The Plaintiff theory is (1) that, pursuant to 42 U.S.C. § 2000e-2, the defendant discriminated against the Plaintiff because of her sex; (2) that, as prohibited by 42 U.S.C. § 2000e-3, the defendant retaliated against the Plaintiff

because she filed grievances; and (3) that the defendant violated the Equal Pay Act, 29 U.S.C. § 206." (RE 51, Final Pretrial Order, p. 2). The final pre-trial order supplants the pleadings and controls the subsequent course of the action. (RE 51, Final Pretrial Order, p. 7; Rule 16(e), Fed. R. Civ. P.)

Furthermore, during the opening statements at trial, the court asked the Plaintiff's counsel to elaborate upon his claim that the Defendant had discriminated against the Plaintiff because of her sex. Ms. Russell's attorney stated that her claims are that she was discriminated against in her demotion and that her termination from employment was a result of retaliation.[3]

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[3] THE COURT: Let me ask you this. I've got your final pre-trial order here this morning. The first claim is that the defendant discriminated against plaintiff because of her sex?

MR. BERKE: Right

THE COURT: In what way? Elaborate on that.

MR. BERKE: Well, Your Honor, I think the first way they discriminated against her, Ms. Russell, we've got two separate claims, one is the demotion, and one is the firing. So they discriminated against her because of, through her demotion we believe that the –

THE COURT: Demotion from what to what?

MR. BERKE: From the administrator at Dodson Avenue to the patient financial services manager at Dodson Avenue.

(Plaintiff's Attorney, TR 10).

THE COURT: So really you're saying that, your main claim with respect to her termination is the fact that she was retaliated against for filing these grievances and filing the EEOC?

MR. BERKE: That's correct, Your Honor.

Additionally, the issues raised by Ms. Russell in her appeal to the Sixth Circuit are found at pages 19-20 of the Respondent's Appendix.

Now, for the first time, the Plaintiff claims that error was made in the adjudication of her Section 1981 claim (Petition, pages 4-5) even though the Petitioner did not have a Section 1981 claim nor did she even assert racial discrimination to support it; a due process claim under the 14th Amendment (Petition, pages 19-22 and Appendix C) against her former employer for alleged deficiencies in its internal grievance procedures, even though, again, the Petitioner has never previously asserted such a claim; a disparate impact claim under Title VII (Petition, page 24) which also is being asserted for the first time; and a sexual harassment/hostile work environment claim

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THE COURT: Okay. Well, so you're not saying then or are you saying that her termination was because of her gender?

MR. BERKE: Well, Your Honor, that the actions that Mr. Head took and the proof will show that all of his actions were laced with gender references and that she was constantly treated as if she were, he constantly looked at her as a woman and thought he could treat her certain ways because of that, but I would say that our main claim regarding the firing would be retaliation.

THE COURT: Now, you mentioned certain things, comments made. Are you talking – do you have an allegation of sexual harassment here or not?

MR. BERKE: No, we don't believe that the comments amount to what is sexual harassment.

THE COURT: Then your other claim is what, the equal pay claim?

MR. BERKE: Equal pay claim.

(Plaintiff's Attorney, TR 11-12).

(Petition, pages 6, 11), which is another new claim and which the Plaintiff's counsel at trial specifically denied that she was bringing. (*See supra* note 3).

This Court does not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 233-34 (1976). It is improper for the Petitioner to now raise claims for the first time that were never brought before the trial court for determination or before the appellate court for review. Certainly, there can be no error made in the adjudication of a claim for this Court to review if there has been no previous claim.

III. THE ELEMENTS OF A PRIMA FACIE CASE IS NOT AT ISSUE BECAUSE THE TRIAL COURT ASSUMED THAT A PRIMA FACIE CASE WAS ESTABLISHED AND THEN EVALUATED WHETHER THE PLAINTIFF HAD PROVEN THE ULTIMATE QUESTION OF DISCRIMINATION.

The Petitioner asserts that the trial court erred by incorrectly stating the fourth element of the prima facie case in a failure to promote claim. First, it should be noted that the Petitioner did not raise this issue as error before the Sixth Circuit (Respondent's App. pp. 19-20). Second, even assuming that this issue had been raised before the Sixth Circuit, the appellate court would not have reached this issue because the trial court in its decision assumed that a prima facie case had been established and then evaluated whether the Plaintiff had met her overall burden of establishing discrimination. Under the *McDonnell Douglas – Burdine* framework, the Plaintiff has the initial burden of proving a prima facie case of discrimination. If the Plaintiff establishes a prima facie

case, the burden of production shifts to the Defendant to articulate the legitimate non-discriminatory reason for the employment action. The burden then shifts back to the Plaintiff to prove by a preponderance of the evidence that the reasons offered by the Defendant were not its true reasons but were a pretext for discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). This burden on the Plaintiff "merges with the ultimate burden in persuading the court that [the Plaintiff] had been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256. In *St. Mary's Honors Center v. Hicks*, 509 U.S. 502, 510 (1993), the Supreme Court stated that once "the defendant had succeeded in carrying its burden of production, the *McDonnell Douglas* framework – with its presumptions and burdens – is no longer relevant."

In the present case, the trial court first discussed the failure of the Plaintiff to establish a prima facie case. (Respondent's App. pp. 8, 10-11). The court then assumed that a prima facie case was established and weighed the evidence in terms of whether the Plaintiff had established the ultimate issue of discrimination. (Respondent's App. pp. 9-10). The District Court found that Ms. Russell failed to carry the ultimate burden of establishing discrimination by a preponderance of the evidence. (Respondent's App. p. 10).

The Petition claims that the elements of the prima facie case as stated by the District Court are incorrect; but this point, even if assumed to be true, is moot. The District Court assumed that the Plaintiff had established a prima facie case and then continued to consider the

evidence in the terms of whether Ms. Russell had carried her ultimate burden of proving discrimination by a preponderance of the evidence.

Finally, the District Court's formulation of the prima facie case is correct. This is the same formulation established by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 802, n.13 (1973). *See also Betkerur v. Aultman Hosp. Ass'n*, 78 F.3d 1079, 1093 (6th Cir. 1996). The case cited by the Petitioner in support of her position, *Stancil v. Claytor*, 30 F.E.P. (BNA) 730 (D.D.C. 1978) is a District Court opinion and not a Supreme Court decision, as is represented in the Petition. The *Stancil* case also in no way supports the Petitioner's argument.

The Petition also argues that it was error for the court to use the *McDonnell Douglas-Burdine* formula at all because of the direct evidence of discrimination. The Petition relies upon the alleged statements of Mr. Head to supply the purported direct evidence. Although Mr. Head denied making those statements, even if they are accepted as true, the statements are not related to his decision whether to promote Ms. Russell and are not direct evidence. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) ("statements by decision makers unrelated to the decisional process itself" do not suffice to shift the burden to the employer). As previously discussed, the District Court weighed all the evidence and found that the Plaintiff had not established discrimination. The Petition's argument is without merit.

IV. THE COURT DID NOT ERR BY DENYING MS. RUSSELL'S EQUAL PAY ACT CLAIM BECAUSE SHE PROVIDED NO EVIDENCE TO SUPPORT IT.

The trial court properly dismissed Ms. Russell's Equal Pay Act claim because she presented no evidence that her rate of pay was below that of a male in a substantially similar position. Ms. Russell argued at trial[4] and before the Sixth Circuit that her duties in the Site Administrator position should be compared to those responsibilities as a Finance Director. First, as the trial court noted, it is improper for Ms. Russell to compare the position of Site Administrator to that of the Finance Director because Ms. Russell was never placed in the position of the Site Administrator. Second, even assuming that Ms. Russell was the Site Administrator, she produced no evidence establishing that this position required substantially equal skill, effort, and responsibility with that

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[4] THE COURT: Well, okay. So on the equal pay thing, you're saying then that she should be compared with the administrator?

MR. BERKE: With the finance director, which is somebody on that level . . . .

THE COURT: But, back to equal pay. What are we – I still don't know what two job titles are we comparing here.

MR. BERKE: We're comparing administrator with the finance director. And we're comparing, we're comparing the salary raises between the employees, between the various administration people at Dodson, I mean, at the health center.

THE COURT: Even though she was never finance director?

MR. BERKE: That's correct, Your Honor. That is correct, Your Honor.

(Plaintiff's Attorney, TR 269-70).

of the Finance Director position, as is required to sustain such a claim. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 623, (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). Ms. Russell conceded at trial that there was never a job description prepared for the position of Site Administrator. (Marlena Russell, TR 113). Therefore, it is not possible for her to identify the nonexistent responsibilities of the Site Administrator position with those of the Director of Finance position. Furthermore, Ms. Russell failed to produce any evidence of the skill, effort, and responsibility of the Finance Director position during the time that Ms. Russell claims to have been the Site Administrator. Ms. Russell offers only the testimony of a previous Director of Finance, Austin Swett, who left the position in August, 1992, before Ms. Russell even was to have assumed the Site Administrator position as initially planned. (Austin Swett, TR 220). Therefore, Ms. Russell is unable to describe the job responsibilities of the Site Administrator position, and fails to describe the skill, effort, and responsibility of the Finance Director position during the pertinent period. Mr. Head testified that the job duties of the two positions (Site Administrator and Finance Director) would be dramatically different, and Ms. Russell produces absolutely no evidence that they were comparable. (Albert Head, TR 280).

Now, for the first time, Ms. Russell argues that her Patient Financial Services Manager position should be compared to other unnamed manager positions, but again, Ms. Russell fails to provide any evidence concerning which manager positions she is comparing; the skill, effort, and responsibility of the respective position; or the

pay for each position. Certainly, this argument is without merit.

V. THE PETITION PRIMARILY SEEKS TO HAVE THIS COURT SETTLE FACTUAL DISPUTES, AND NOT ISSUES OF LAW.

The questions presented for review in the Petition raise purported legal issues to be addressed by the Court. As the previous discussion has shown, however, these legal issues invariably concern non-existent conflicts between the circuits, legal arguments that are not reached by the court's analyses, or legal claims that are never even asserted. A review of the Petition shows that substantially all of the Petitioner's arguments deal primarily with factual issues. The issue of whether Ms. Russell was promoted to the Site Administrator's position or remained in her original position of Patient Financial Services Manager, the intent of Mr. Head in not promoting Ms. Russell to the Site Administrator's position, or the motivation of Mr. Jones in dismissing Ms. Russell following her refusal to pick up the bank bags, are all issues of facts that were appropriately determined by the trial court and reviewed by the appellate court.

As this Court has stated, "A court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). Further review by this Court is not warranted

because the Petitioner principally seeks review of factual allegations, and not issues of law.

CONCLUSION

The Respondent respectfully submits that this case presents no issue of law or fact that justifies review by the United States Supreme Court. Petitioner has had appropriate review at both the district and appellate court levels. The decisions of these courts are proper and the Petition for Writ of Certiorari should be denied.

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NOT RECOMMENDED FOR PUBLICATION

No. 97-5732

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARLENA N. RUSSELL, **Plaintiff-Appellant,** v. CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY, **Defendant-Appellee.**	**ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE **MEMORANDUM OPINION** (Filed Sept. 08, 1998)

BEFORE: KRUPANSKY, NORRIS, and SILER, Circuit Judges.

PER CURIAM. Plaintiff, Marlena N. Russell, appeals from a judgment rendered against her by the district court following a trial to the court. In her lawsuit, she contended that she was the victim of gender discrimination and retaliation. The court provided the parties with its findings of fact and conclusions of law.

Having had the benefit of oral argument, and having carefully considered the record on appeal, the briefs of the parties, and the applicable law, we are not persuaded that plaintiff has demonstrated clear error by the district court in its findings of fact, or any commission of an error of law that would warrant reversal.

Because the reasoning supporting judgment for defendant, Chattanooga-Hamilton County Hospital Authority, has been articulated by the district court, the issuance of a detailed written opinion by this court would be duplicative and serve no useful purpose.

Accordingly, the judgment of the district court is **affirmed** upon the reasoning employed by that court in its Memorandum Opinion filed on May 14, 1997.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

MARLENA N. RUSSELL, *Plaintiff,*	)	
v.	)	1:94-cv-001 *Edgar*
CHATTANOOGA-HAMILTON COUNTY HOSPITAL AUTHORITY, *Defendant.*	)	

MEMORANDUM OPINION

(Filed May 14, 1997)

This case was tried before this Court without a jury on May 1, 2, and 5, 1997. This memorandum is the Court's findings of fact and conclusions of law.

Defendant Chattanooga-Hamilton County Hospital Authority operates, among other things, two health centers in the Chattanooga, Tennessee area; the Alton Park Community Health Center and the Dodson Avenue Community Health Center. The health centers are managed together as a unit.

Plaintiff Marlena N. Russell ("Russell") was hired by the defendant in 1990 as Finance Manager for the health centers. She was physically located at Alton Park, but her job encompassed finance matters at both the Alton Park and Dodson Avenue locations. At first, Russell reported to the Director of Finance, Austin Swett. However, when

Albert Head ("Head") became Director of the health centers in 1991, and after Mr. Swett resigned in August 1992, Russell reported to Head. During this time her job duties, but not her compensation, expanded, and her job title changed to Patient Financial Services Manager.

The health centers provide medical services in low income geographical areas. The centers are funded in part by federal grants. In the spring or summer of 1992, federal officials reviewed the operations of the health centers and made certain recommendations as to how they might be operated more effectively. Among the recommendations was that a "Site Administrator" be placed at the Dodson Avenue location. Albert Head discussed this position with Russell, and there seems to have been a fairly clear understanding between Head and Russell in the fall of 1992 that Russell would eventually be placed in the Dodson Avenue Site Administrator slot. The target date was December 1, 1992, which at that time was the beginning of the fiscal year for the centers. The salary for this new position was to be $39,000 per annum. Russell was making $32,000 per annum as Patient Financial Services Manager.

In 1992 the defendant directed that the health centers integrate their bookkeeping and records with that of the defendant hospital. The hospital's system was known as the "BHIS" system. This integration proved to be difficult, and was not anywhere near completion by December 1, 1992. Russell, in her financial job, was important to this effort. Thus, Mr. Head decided that he needed Russell to perform her current job more than he needed a Site Administrator at that time. Therefore, sometime around December 1, 1992, he advised Russell that he was

postponing the job change, and would take another look at the situation around March 1, 1993. Meanwhile, Russell kept pressuring Head by asking for a job description of the Site Administrator's job, and even preparing one herself. At Russell's request, Head did allow Russell to move her office to the Dodson Avenue location in late November 1992. The delay irritated Russell and affected her attitude toward her job. This attitude, and a few other matters, caused Head to become disenchanted with Russell. These other matters included his perception that Russell had mishandled a problem with an employee with a disability; her sharing of confidential information with other employees; and problems that Russell had with the BHIS conversion.

At the beginning of March 1993, the plaintiff was not put in the administrator's position. Derrek Jones ("Jones") was hired as Director of Financial Operations, and plaintiff was to report to him. This caused Russell, who was already disgruntled, to become even more disgruntled. On March 22, 1993, Russell filed a grievance which was handled within the defendant's in-house grievance procedures. In this grievance, she complained that actions taken by Head amounted to "sexual discrimination, harassment, deliberate deception, and dishonesty." Before this grievance could be resolved, the plaintiff on May 4, 1993, filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that Mr. Head and the defendant hospital authority discriminated against her because of her sex. This charge, as subsequently amended in October 1993, forms the jurisdictional predicate for this case.

The Dodson Avenue Center has daily cash receipts. They fall in the range of $800 to $1,100 per day. It is defendant's policy, for daily accounting and security reasons, that these receipts be brought to the bank approximately four blocks away after the close of business each day. The receipts must be locked in cloth bank bags and placed in the bank's night deposit. Each business day the bags must be picked up at the bank for use in that night's deposit.

On May 25, 1993, Russell, along with two other employees, was registering patients at the Dodson Avenue Center. She sent another employee, Rosetta Price, to pick up the bank bags. Price, however, was unable to pick up the bags because her name and signature were not on the bank's authorization list. At this point, Russell made up her mind that she would not pick up the bags on that day, May 25th. In a telephone call later that afternoon with her supervisor, Derrek Jones, who was at the Alton Park Center, Russell told Jones that she could not pick up the bags because the bank did not have her signature. Jones, after checking, advised Russell that the bank did indeed have her signature and that she was authorized to pick up the bags. (Later Russell was to assert that she could not leave the center because at 3:30 p.m., about the time she talked to Jones on the phone, an hysterical woman came into the clinic needing attention.)

Jones, over the phone, directed plaintiff three times to pick up the bags, advising her that she had plenty of time to do it, the bank being only four blocks away. Yet, plaintiff refused to pick up the bags, finally telling Jones that she wasn't going to "argue" about it, and that the day's cash receipts would be kept in the center's safe that

night, and not placed in the bank. The bags were not picked up that evening. Instead, Russell drafted a memorandum to Jones wherein she complained that the bank bags would not be picked up because the center had not done the necessary paperwork to authorize Rosetta Price to pick up the bags.

After Russell had refused to pick up the bags on May 25th, Jones checked with the defendant's human resources office and was advised that a refusal to follow job instructions was a Class IV offense under the defendant's discipline policies, and that Jones had the option of terminating the plaintiff for this. Jones pondered what to do. He knew about Russell's March 22, 1993 grievance, but not about the EEOC charge that had been filed on May 4th. While he discussed the situation with Al Head, it was left to Jones to make the decision about firing the plaintiff. When he viewed Russell's May 25, 1993 memorandum the next morning, Jones decided to terminate Russell. He viewed this memorandum, by its omissions, as materially misrepresenting the reasons for the non-pickup of the bank bags. The next day Jones terminated Russell for refusal to follow instructions.

Analysis

Russell makes three claims. They are dealt with herein below *seriatim*.

A. Demotion-Failure to Promote

Russell claims that the defendant violated 42 U.S.C. § 2000e-2 by demoting her from the position of Site

Administrator at the Dodson Avenue Center. Actually this should be viewed as a failure to promote claim, since Russell was never actually given the Site Administrator position. Thus, the plaintiff's claim is that she was not promoted to Site Administrator because of her gender, female, in violation of 42 U.S.C. § 2000e-2. To prove a sex or gender discrimination "disparate treatment" claim in a failure to promote context, the plaintiff must first establish as a *prima facie* case:

> (1) that she belongs to a protected group;
>
> (2) that she was qualified for and applied for and applied for a promotion;
>
> (3) that she was considered for and denied the promotion; and
>
> (4) that other employees of similar qualifications who are not members of the protected group were indeed promoted at the time the plaintiff's request for promotion was denied.

Brown v. Tennessee, 693 F.2d 600, 603 (6th Cir. 1982). The plaintiff has not made out a *prima facie* case. She has established the first three, but not the fourth, element of a *prima facie* case. The Site Administrator position was never filled. No one to this day has ever been promoted or otherwise placed in that position. In short, there are no circumstances here which give rise to an inference of unlawful discrimination.

If Russell has established a *prima facie* case, the defendant has indeed satisfied its burden of production to produce evidence that its failure to promote plaintiff was for legitimate, nondiscriminatory reasons. *See Texas*

Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The defendant hospital determined that, despite the recommendations of the federal grant administrators, it did not need to fill the position. In addition, there were matters relating to the plaintiff's job performance that gave Albert Head some second thoughts about placing plaintiff in the Site Administrator position. Among such matters were Russell's continually pestering Head about a job description; Russell's handling of a disabled employee at Dodson Avenue; and difficulties plaintiff was having with the BHIS system. Since defendant has not met its burden of production, it is incumbent upon plaintiff Russell to prove by a preponderance of the evidence that the real reason she wasn't given the Site Administrator job is her gender. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993); *Burdine*, 450 U.S. at 256. She has not met this burden.

Russell cites, in support of her discrimination contention, several statement made by Mr. Head in 1992 and 1993. Among these statements are the following:

> (1) Head remarked on one occasion that he did not want to hear plaintiff "bitch."
>
> (2) When discussing the job description, Head say, "Why is it that a black woman has to have a piece of paper to trust a black man?"
>
> (3) Head told her that as a black woman she should support Head as a black man.
>
> (4) Head said at a meeting of employees that, "Brown people will rule the world."
>
> (5) Head at one point observed that plaintiff must be "on her period."

These remarks, or something similar to them, may well have been made by Mr. Head. However, they do not lead to a conclusion that he did not make Russell Site Administrator because of her gender. Some of the remarks may have been inappropriate, but they generally reflect Head's growing aggravation with Russell. The derivation of this aggravation had nothing to do with Russell's gender. Head would doubtless have had the same reaction had Russell been a male.

"Liability in a disparate treatment case depends on whether the protected trait actually motivated the employer's decision." *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 683, 136 L. Ed. 2d 608 (1997). Plaintiff has not proved such motivation by a preponderance of the evidence.

B. Retaliation

Plaintiff claims that her termination on May 26, 1993, was in retaliation for her having engaged in protected activity, and thus in violation of 42 U.S.C. § 2000e-3. The four elements of a *prima facie* retaliation case are:

(1) that she engaged in activity protected by Title VII;

(2) that this exercise of protected civil rights was known to the defendant;

(3) that defendant thereafter took an employment action adverse to the plaintiff; and

(4) that there was a causal connection between the protected activity and the adverse employment action.

Canitia v. Yellow Freight System, Inc., 903 F.2d 1064, 1066 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990).

Plaintiff has established the first three elements of a *prima facie* case, but not the fourth element. She did engage in protected activity (filing the grievance and the EEOC charge); this was known to the defendant; and plaintiff's employment was indeed terminated. At issue here is the causation. Other than the circumstantial fact that her discharge came after Russell's protected activity, the only evidence which might be construed as indicating a retaliatory motive is plaintiff's testimony that Mr. Head at some point said that plaintiff would "not leave in good standing." This statement is, at best, ambiguous.

Assuming, however, that plaintiff has made out a *prima facie* case of retaliation, the defendant has satisfied its burden of production to articulate a non-retaliatory motive for its action. Defendant says that plaintiff was terminated for refusing to comply with instructions given her by her supervisor, *i.e.*, the instructions to pick up the bank bags. Much of the proof in this case swirls around the "bank bag" incident of May 25, 1993. The facts comprising this incident are recited above. What happened here was that Russell was so angry and disgruntled with the defendant hospital, with Mr. Head, and especially with having to report to Jones, she just decided that she was not going to comply with Jones' instructions to pick up the bags. Russell's insubordinate conduct gave Jones ample cause to terminate her.

Having the bank bags available for the night deposit was indeed important to the health centers. The instigator of Russell's departure was Derrek Jones, not Albert Head.

Jones had no reason to retaliate against Russell for filing a grievance. He did not even know about the EEOC charge. In sum, Russell has not proved that her discharge was the result of retaliatory motive. *Canitia*, 903 F.2d at 1067.

C. *Equal Pay*

Finally, plaintiff claims that the defendant violated the Equal Pay Act, 29 U.S.C. § 206. To establish a *prima facie* case, the plaintiff must show that "she performed a job that required substantially equal skill, effort, and responsibility, but that she received less than equal pay. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 623 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). Russell has made no such showing. Russell points to a discussion that she had with Albert Head about the proposed pay scale for the health centers. She asserts that she complained to Head that the Dodson Avenue Site Administrator should have a higher salary than that of the Finance Director for the centers, instead of vice versa. Head reportedly responded something to the effect that his finance person would be a man, and men needed to feed their families. This mindset is indeed the kind of thing against which the Equal Pay Act is undoubtedly directed. However, we cannot here compare the Finance Director position with the Site Administrator position because plaintiff was never placed in either job. Moreover, we know nothing about the skill, effort, and responsibility that is required for those jobs. In short, the plaintiff has not presented any evidence that she received less pay than any employee, male or female, who was performing a job that required

substantially equal skill, effort, and responsibility as compared to any job that plaintiff held. Therefore, her equal pay claim fails.

A judgment will enter for the defendant.

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

MARLENA N. RUSSELL, *Plaintiff,*	)	
v.	)	1:94-cv-001 *Edgar*
CHATTANOOGA- HAMILTON COUNTY HOSPITAL AUTHORITY, *Defendant.*	)	

JUDGMENT

(Filed May 14, 1997)

This action came on for trial before this Court without a jury on May 1, 2 and 5, 1997, and the issues having been duly tried, and a decision having been rendered, which decision is embodied in the Court's memorandum filed herewith, it is **ORDERED** and **ADJUDGED** that the

plaintiff take nothing, and the action be **DISMISSED** on the merits. The parties will bear their own costs.

ENTER:

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES
DISTRICT JUDGE

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

ADVISORY COMMITTEE NOTES
1985 Amendment

Rule 52(a) has been amended (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of

some courts of appeals, and (3) to promote nationwide uniformity. See Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 Va. L.Rev. 506, 536 (1963).

Some courts of appeal have stated that when a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous. See, e.g., *Marcum v. United States*, 621 F.2d 142, 144-45 (5th Cir.1980). Others go further, holding that appellate review may be had without application of the "clearly erroneous" test since the appellate court is in as good a position as the trial court to review a purely documentary record. See, *e.g., Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 614 (7th Cir.), cert. denied, 459 U.S. 880 (1982); *Lydle v. United States*, 635 F.2d 763, 765 n. 1 (6th Cir.1981); *Swanson v. Baker Indus., Inc.*, 615 F.2d 479, 483 (8th Cir.1980); *Taylor v. Lombard*, 606 F.2d 371, 372 (2d Cir.1979), cert. denied, 445 U.S. 946 (1980); *Jack Kahn Music Co. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 758 (2d Cir.1979); *John R. Thompson Co. v. United States*, 477 F.2d 164, 167 (7th Cir.1973).

A third group has adopted the view that the "clearly erroneous" rule applies in all nonjury cases even when findings are based solely on documentary evidence or on inferences from undisputed facts. See, *e.g., Maxwell v. Sumner*, 673 F.2d 1031, 1036 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982); *United States v. Texas Education Agency*, 647 F.2d 504, 506-07 (5th Cir.1981), *cert. denied*, 454 U.S 1143 (1982); *Constructora Maza, Inc. v. Banco de Ponce*, 616 F.2d 573, 576 (1st Cir.1980); *In re Sierra Trading Corp.*, 482 F.2d

333, 337 (10th Cir.1973); *Case v. Morrisette*, 475 F.2d 1300, 1306-07 (D.C.Cir.1973).

The commentators also disagree as to the proper interpretation of the Rule. *Compare* Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn.L.Rev. 751, 769-70 (1957) (language and intent of Rule support view that "clearly erroneous" test should apply to all forms of evidence), *and* 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil § 2587*, at 740 (1971) (language of the Rule is clear), *with* 5A J. Moore, *Federal Practice* ¶ 52.04, 2687-88 (2d ed. 1982) (Rule as written supports broader review of findings based on non-demeanor testimony).

The Supreme Court has not clearly resolved the issue. See, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 104 S.Ct. 1949, 1958 (1984); *Pullman Standard v. Swint*, 456 U.S. 273, 293 (1982); *United States v. General Motors Corp.*, 384 U.S. 127, 141 n. 16 (1966); *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-96 (1948).

The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the

facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

STATEMENT OF ISSUES

(BY PETITIONER ON APPEAL TO THE SIXTH CIRCUIT)

1. IN EACH ISSUE THE LOWER COURT DISCUSSED IN ITS MEMORANDUM OPINION, IT ERRONEOUSLY FOCUSED ON THE QUESTION OF A *PRIMA FACIE* CASE RATHER THAN ON THE QUESTION OF RETALIATION OR DISCRIMINATION. BECAUSE THE LOWER COURT APPLIED THE WRONG VIEW OF THE LAW, ITS DETERMINATIONS ARE REVIEWABLE *DE NOVO*.

2. RUSSELL ESTABLISHED A CAUSAL CONNECTION BETWEEN THE FILING OF HER GRIEVANCE AND HER DEMOTION.

3. RUSSELL ESTABLISHED A CAUSAL CONNECTION BETWEEN THE FILING OF HER CLAIM WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND HER FIRING.

4. IN DETERMINING THAT THE HOSPITAL DID NOT RETALIATE AGAINST RUSSELL THE LOWER COURT FAILED TO ADDRESS THE ISSUE OF PRETEXT. THIS FAILURE TO APPLY THE APPROPRIATE LAW IS REVIEWABLE *DE NOVO*.

5. THE TRIAL COURT'S FINDING THAT RUSSELL WAS NEVER ACTUALLY GIVEN THE SITE ADMINISTRATOR POSITION IS NOT SUPPORTED BY THE RECORD. IT IS AN INCORRECT FINDING OF FACT AND THEREFORE SHOULD BE SET ASIDE AS CLEARLY ERRONEOUS.

6. THE TRIAL COURT ERRONEOUSLY APPLIED THE WRONG RULE OF LAW WHEN IT CHARACTERIZED THIS ISSUE AS A FAILURE TO PROMOTE RATHER THAN A DEMOTION ISSUE. THE COURT'S DETERMINATIONS ARE THEREFORE REVIEWABLE *DE NOVO*.

7. RUSSELL CAN SHOW, BY A PREPONDERANCE OF THE EVIDENCE, THAT HER DEMOTION WAS DUE TO HER GENDER.

8. THE COURT BELOW ERRED IN DENYING RUSSELL'S EQUAL PAY ACT CLAIM BY RELYING ON JOB TITLES RATHER THAN ACTUAL DUTIES PERFORMED AND BY DETERMINING THAT SHE HAD NEVER HELD THE POSITION IN QUESTION.

9. THE LOWER COURT FAILED TO PROPERLY PRESERVE EVIDENCE FOR THE RECORD OF APPEAL.

STATEMENT OF THE FACTS

(BY RESPONDENT TO THE SIXTH CIRCUIT)

Ms. Russell is a former employee of the Chattanooga-Hamilton County Hospital Authority ("Hospital Authority"). The Hospital Authority operates Erlanger Medical Center, the Alton Park Health Center and the Dodson Avenue Community Health Center ("Health Centers"), and other entities. (Opening Statements, Andrew Berke at TR 4, Apx. at p.161; Albert Head at TR 336, Apx. at p.401). Ms. Russell was hired as the Finance Manager of the Health Centers on December 17, 1990, and at the time of her employment termination, her job title was Patient Financial Services Manager. (Marlena Russell at TR 27, Apx. at p.170).

In September, 1991, Albert M. Head, was appointed by the Hospital Authority Board of Trustees to be the Executive Director of the Health Centers. (Albert Head at TR 273-75, Apx. at pp.338-40). Mr. Head was hired as a "change agent" and was assigned the task of reorganizing the Health Centers to streamline costs and increase utilization of Erlanger Medical Center management in the Health Centers' operations. (Albert Head at TR 275, 305, Apx. at pp.340, 370; Marlena Russell at TR 110, Apx. at p.248).

The Health Centers receive a substantial amount of their funding from federal grants received from the United States Department of Health and Human Services. (Albert Head at TR 275-76, Apx. at pp.340-41; Marlena Russell at TR 34-35, Apx. at pp.177-78). In Spring, 1992, one of the representatives from the Department of Health and Human Services recommended that a site administrator be appointed to the Dodson Avenue Community

Health Center. (Albert Head at TR 277, Apx. at p.342). Mr. Head decided during the Summer of 1992, to accept this recommendation, and expressed to Ms. Russell his intention to name her as the new site administrator, effective December 1, 1992. (Albert Head at TR 278, 281, Apx. at pp.343, 346).

In October, 1992, Mr. Head was informed by James Pickle, then Chief Executive Officer of Erlanger Medical Center, that the Health Centers were to adopt the Erlanger Medical Center computerized management information system, known as the BHIS system. (Albert Head at TR 284, Apx. at p.349). The BHIS conversion was supposed to be completed by December 1, 1992. (Albert Head at TR 285, Apx. at p.350). The BHIS system would connect the Health Centers' accounting system, medical records systems, and pharmacy with Erlanger Medical Center's Information System. (Albert Head at TR 284, Apx. at p.349). The conversion by the Health Centers to the BHIS system directly impacted the operations and functioning of the patient accounts and medical records areas of the Health Centers that were managed by Ms. Russell. (Albert Head at TR 284, Apx. at p.349; Marlena Russell at TR 110, Apx. at p.248). Mr. Head determined that he needed Ms. Russell to remain in her present position as Patient Financial Services Manager to oversee the implementation of the BHIS system. (Albert Head at TR 284, Apx. at p.349).

In November, 1992, Mr. Head told Ms. Russell that he needed her to remain in the position of Patient Financial Services Manager because of the BHIS conversion and that by March 1 he would review the decision to place her in the Site Administrator position. (Albert Head at TR

285-86, 323, Apx. at pp.350-51, 388). Ms. Russell asked Mr. Head if she could move her office to the Dodson Avenue Health Center site and he told her that she could, but Mr. Head did not say, nor did he intend, that she take the position of Site Administrator. (Albert Head at TR 286, Apx. at p.351). Mr. Head further did not know that Ms. Russell intended to move into an office already occupied by the Medical Director, instead of into a vacant office. (Albert Head at TR 354-55, Apx. at pp.419-20). Ms. Russell began asking Mr. Head repeatedly and persistently for a job description of the Site Administrator position and this request became a "prerequisite for everything that we did." (Albert Head at TR 286, 326, Apx. at pp.351, 391; Marlena Russell at TR 45, 53-54, 63-64, Apx. at pp.188, 196-97, 206-07; Plaintiff's Exhibits 13 and 14, Apx. at pp.516-17). There was never a job description formalized for this position (except for one that was prepared by Ms. Russell), there were never any personnel documents prepared reflecting that Ms. Russell would be or had been transferred to the position of Site Administrator, there were never any wage or benefits documents prepared reflecting such a change, and there was never any change in the wages paid to Ms. Russell. (Marlena Russell at TR 113, Apx. at p.250). Ms. Russell was never placed in this position. (Albert Head at TR 292, Apx. at p.357; Albert Barnett at TR 439, 444, Apx. at p.488, Supp. Apx. at p.573).

In January, February and March, 1993, Mr. Head began receiving complaints from other staff members concerning Ms. Russell. These complaints included a complaint from Dr. Harris, the Medical Director, that Ms. Russell had begun to move her personal belongings into

the office at the Dodson Avenue Community Health Center that was occupied by him, and that she had begun removing his belongings out of that office without giving him prior notice. (Albert Head at TR 287, Apx. at p.352; Marlena Russell at TR 115-17, Apx. at pp.252-54; Charlesetta Woodard-Thompson at TR 453-55, Apx. at pp.499-501). Additionally, Mr. Head shared confidential information with Ms. Russell concerning the supervisory roles that he was considering, and Ms. Russell subsequently and mistakenly told Dr. Harris and Wanda Robinson, the Director of Clinical Nursing, that they would be reporting to her in the future. (Albert Head at TR 286-87, Apx. at pp.351-52). Dr. Harris and Ms. Robinson then brought their concerns to Mr. Head regarding Ms. Russell's supposed supervision of them. (Albert Head at TR 287, 315, Apx. at pp.352, 380; Marlena Russell at TR 114-15, Apx. at pp.251-52).

Mr. Head also began hearing that the Patient Accounts area of the Health Center, under Ms. Russell's management, was experiencing numerous problems in adopting the new BHIS system. (Albert Head at TR 285-90, Apx. at pp.350-55). In February, 1993, Lois Uren, a representative from Erlanger's Accounting Department, came to assist the Health Centers in the conversion. (Albert Head at TR 288-290, Apx. at pp.353-55; Lois Uren at TR 421, Apx. at p.473). Following a month long evaluation of the Patient Accounts area of the Health Centers, reports prepared by the Erlanger Accounting Department were submitted concerning the operations of the Patient Accounts area and severely criticizing the performance of Ms. Russell. (Lois Uren at TR 421-27, Apx. at pp.473-79; Defendant Exhibits 59 and 61, Apx. at pp.562-63, 566-67).

Mr. Head did not suggest or attempt to influence the contents of this report. (Albert Head at TR 290, Apx. at p.355; Lois Uren at TR 426-27, Apx. at pp.478-79). Ms. Russell filed a grievance concerning the tone of the reports. (Marlena Russell at TR 149, Apx. at p.286).

Finally, Mr. Head received complaints from a disabled employee and from the Erlanger Human Resources Department concerning the treatment by Ms. Russell of this employee, who had requested certain accommodations because of a mental disability. (Albert Head at TR 281-84, Apx. at pp.346-49). Mr. Head met with Erlanger Medical Center's Human Resources Department and received specific instructions concerning the transfer of the disabled employee and the accommodation steps that needed to be taken. (Albert Head at TR 281-84, Apx. at pp.346-49; Charlesetta Woodard-Thompson at TR 450-53, Apx. at pp.496-99). Mr. Head instructed Ms. Russell regarding the actions that were needed, but Ms. Russell completely disregarded his instructions. (Albert Head at TR 281-84, Apx. at pp.346-49). The employee again complained to the Human Resources Department and threatened legal action. (Albert Head at TR 282-83, Apx. at pp.347-48; Charlesetta Woodard-Thompson at TR 453, Apx. at p.499). Mr. Head was required to intervene again, and removed Ms. Russell from the situation in order to avoid legal liability. (Albert Head at TR 284, 315-16, Apx. at pp.349, 380-81).

In February or March, 1993, Mr. Head determined that Ms. Russell should remain in the Patient Financial Services Manager position, rather than being transferred to the Dodson Avenue Site Administrator position. (Albert Head at TR 291, Apx. at p.356). Ms. Russell was

informed by Mr. Head of his decision, and on March 4, 1993, she was told that she would be directly supervised by the Director of Finance, Derrek Jones. (Albert Head at TR 291, Apx. at p.356).

On March 22, 1993, Ms. Russell filed another grievance, this time against Mr. Head, alleging sexual discrimination in his decision not to transfer her to the Dodson Avenue Site Administrator position. (Albert Head at TR 292, Apx. at p.357; Marlena Russell at TR 71, Apx. at p.214). On May 4, 1993, Ms. Russell filed a charge with the Equal Employment Opportunity Commission alleging sex discrimination by Mr. Head and the Hospital Authority in the decision not to transfer her into the Site Administrator position. (Marlena Russell at TR 75, Apx. at p.218).

On May 25, 1993, Ms. Russell was performing her duties as a Patient Financial Services Manager at the Dodson Avenue Community Health Center by registering patients at the Health Center. Employees Evelyn Moore and Willie Rosetta Price were also registering patients at the Dodson Avenue Community Health Center on that date. (Derrek Jones at TR 359-60, Apx. at pp.424-25; Marlena Russell at TR 119-20, Apx. at pp.256-57; Willie Rosetta Price at TR 172-75, Apx. at p.302, Supp. Apx. at pp.569-71; Evelyn Moore at TR 413, Apx. at p.466; Defendant Exhibit 29, Apx. at pp.542-45).

One of Ms. Russell's job responsibilities as Patient Financial Services Manager was to ensure that bank bags were collected from the bank each day so that daily deposits of cash receipts at the Dodson Avenue Community Health Center could be made. (Derrek Jones at TR

360-61, Apx. at pp.425-26; Marlena Russell at TR 128, Apx. at p.265). This daily deposit of cash and receipts was important, so that cash would not have to be held in the Health Center overnight, and to ensure a sufficient cash flow in the administration of the Health Center. (Derrek Jones at TR 360-61, 384, Apx. at pp.425-26, 449; Earlene Goodwyn at TR 181-82, Apx. at pp.303-04; Austin Swett at TR 223-24, Apx. at p.324, Supp. Apx. at p.572; Evelyn Moore at TR 414, Apx. at p.467).

During the morning of May 25, 1993, Ms. Russell told Ms. Rosetta Price that Ms. Price's name had been added to the bank's list of employees that were authorized to collect the bank bags from the bank, and Ms. Russell instructed Ms. Price to go to the bank to collect the bags. (Marlena Russell at TR 85-86, 122, Apx. at pp.228-29, 259). When Ms. Price arrived at the bank, she was informed that she had not been added to the list of Health Center employees authorized to collect the bank bags and could not do so, so she returned to the Health Center without the bank bags. (Marlena Russell at TR 87, 123, Apx. at pp.230, 260). Following Ms. Price's return, Ms. Russell knew that she was the only individual present at the Dodson Avenue Health Center on May 25, 1993 who was authorized to pick up the bank bags. (Marlena Russell at TR 123, Apx. at p.260). Ms. Russell also knew that it was her responsibility to see that the bank bags were picked up. (Marlena Russell at TR 128, Apx. at p.265; see Defendant Exhibit 28, Apx. at p.541). Ms. Russell made a conscious decision at that time, however, that she would not do so. (Marlena Russell at TR 87, 123, 132, 134, Apx. at p.230, 260, 269, 271). Ms. Russell was not registering any

patients from 12:30 p.m. until 4:00 p.m. (Marlena Russell at TR 128, Apx. at p.265).

At 12:00 noon, Ms. Russell wrote a memorandum to her supervisor, Derrek Jones, stating that the Health Center would have to retain cash on site that night because Mr. Jones had failed to add Ms. Price's name to the bank's list of employees authorized to collect the bank bags. (Marlena Russell at TR 125-26, Apx. at pp.262-63; Defendant Exhibit 28, Apx. at p.541). Ms. Russell further stated that the Health Centers could probably expect a call from the Accounting Department at Erlanger Medical Center concerning their failure to make the bank deposit. (Defendant Exhibit 28, Apx. at p.541). Ms. Russell sent a copy of this memo to Mr. Jones' supervisor, Mr. Head, and to the Accounting Department at Erlanger Medical Center. (Defendant Exhibit 28, Apx. at p.541).

At approximately 3:20 p.m., before he had received the memo, Mr. Jones was informed by Al Barnett, the Assistant Director of Planning and Evaluation of the Health Centers, that the bank bags had not yet been picked up for the Dodson Avenue Community Health Center. (Derrek Jones at TR 362-63, Apx. at pp.427-28). Mr. Jones telephoned Ms. Russell and instructed her to collect the bags herself. (Derrek Jones at 363, 373, Apx. at pp.428, 438). Ms. Russell first responded that she was not authorized to collect the bank bags and that there was a copy of a memo so indicating. (Derrek Jones at TR 364, Apx. at p.429). Mr. Jones told Ms. Russell he was looking at a copy of the same memo in question and that her name was still on the authorization list. (Derrek Jones at TR 364, Apx. at p.429). Mr. Jones then instructed Ms. Russell a second time to collect the bank bags. (Derrek

Jones at TR 364, Apx. at p.429). Ms. Russell then told him that she could not pick up the bank bags because she had too much paperwork to do. (Derrek Jones at TR 364, Apx. at p.429). Mr. Jones told Ms. Russell that since she did not get off work until 5:00 p.m., and since the bank was only three blocks away, that she could go to the bank and pick up the bags, and then complete her paperwork after the bank's closing time of 4:00 p.m. (Derrek Jones at TR 365, Apx. at p.430). Mr. Jones then instructed Ms. Russell for the third time to collect the bank bags. (Derrek Jones at TR 365, Apx. at p.430). Ms. Russell again refused to pick up the bags, and stated to Mr. Jones, her direct supervisor, "I'm not going to argue with you, I'll pick them up tomorrow." (Marlena Russell at TR 135, Apx. at p.272; Derrek Jones at TR 365, Apx. at p.430). Ms. Russell concluded the call by saying that she knew that Mr. Jones would impose a disciplinary action against her for her refusal. (Derrek Jones at TR 374, Apx. at p.439). The bank bags were not picked up that day and the Health Center's cash receipts had to be housed overnight at the Health Center. (Derrek Jones at TR 366, Apx. at p.431). This is the only day of which Mr. Jones was aware that the bank bags were not picked up during his tenure as the Director of Finance. (Derrek Jones at TR 360-61, Apx. at pp.425-26).

Mr. Jones then informed Mr. Head regarding Ms. Russell's refusal to follow his instructions concerning the bank bags. (Derrek Jones at TR 366, Apx. at p.431; Albert Head at TR 293-94, Apx. at pp.358-59). Mr. Head did not advise Mr. Jones concerning any action that should be taken, but instead referred him to the Human Resources Department of Erlanger Medical Center. (Derrek Jones at

TR 366-67, Apx. at pp.431-32; Albert Head at TR 293-94, Apx. at pp.358-59). The Human Resources Department informed Mr. Jones that this action by Ms. Russell could be classified as a Class IV violation of the Hospital Authority's disciplinary policy, refusal to follow a direct order, which would result in termination of employment. (Derrek Jones at TR 366-67, Apx. at pp.431-32). The Human Resources Department also informed Mr. Jones that he, as the supervisor, had the options of ignoring the situation, talking privately with the employee, or imposing a lesser disciplinary action. (Charlesetta Woodard-Thompson at TR 460, Apx. at p.506).

During the night of May 25, Mr. Jones considered what disciplinary action he would take with respect to Ms. Russell. (Derrek Jones at TR 368, 375-76, Apx. at pp.433, 440-41). Mr. Jones was concerned regarding the impact that his actions would have, given that Ms. Russell had a grievance currently pending against Mr. Head. (Derrek Jones at TR 368, 391, Apx. at pp.433, 456). When he arrived at his office on the next morning, May 26, 1993, Mr. Jones saw for the first time the memo that had been prepared by Ms. Russell the previous day alleging that Mr. Jones' failure to change the names on the bank card resulted in the Health Center receipts being housed overnight. (Derrek Jones at TR 368, Apx. at p.433). Mr. Jones noted that the memorandum completely omitted any suggestion that Ms. Russell was authorized to pick up the bank bags, but had refused to do so. (Derrek Jones at TR 368-70, Apx. at pp.433-35). Mr. Jones felt that Ms. Russell in this memo was attempting to place the blame on him for the consequences of her own refusal to pick up the bags. (Derrek Jones at TR 368, Apx. at

p.433). Mr. Jones concluded that Ms. Russell's behavior had gone too far, and decided that Ms. Russell should be dismissed. (Derrek Jones at TR 368, Apx. at p.433). Mr. Jones knew there was a grievance against Mr. Head at this time, but he did not know that Ms. Russell had filed an EEOC charge. (Derrek Jones at TR 372-73, Apx. at pp.437-38).

Ms. Russell claims that she was unable to pick up the bank bags when instructed to do so because she was assisting with an hysterical woman who came into the Health Center complaining that her mother needed heart medicine. (Marlena Russell at TR 94, Apx. at p.237). Ms. Russell stated that this woman was screaming and ranting in the Health Center and that she attempted to calm her down. (Marlena Russell at TR 94, Apx. at p.237). Ms. Russell further testified that she considered this situation to be a matter of life or death for the lady's mother, and felt that if something was not done, then something serious would happen. (Marlena Russell at TR 136, Apx. at p.273).

Ms. Russell subsequently filed a claim for unemployment compensation benefits with the Tennessee Department of Employment Security. (Marlena Russell at TR 142-45, Apx. at pp.279-82). Ms. Russell stated in her initial claim that she could not go to the bank to collect the bank bags because she would be required to leave her department "unmanned." She made this assertion despite the fact that Evelyn Moore and Willie Rosetta Price were present on the day in question. (Marlena Russell at TR 142-45, Apx. at pp.279-82; Defendant's Exhibit 6 and 7,

Apx. at pp.536-38). At no time in these documents, however, did Ms. Russell mention that she was assisting the daughter of a heart patient in a life or death situation.

The position of a Site Administrator for the Dodson Avenue Community Health Center was never filled. (Albert Head at TR 280, 294, Apx. at pp.345, 359).